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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1982

RODNEY WAYNE ELLIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR
WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE UNITED STATES
FROM THE SUPREME COURT
OF THE STATE OF GEORGIA

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QUESTIONS PRESENTED

I.

Is a Constitutional right personal to an accused, or may it be forced upon him by a Trial Court, even when invocation of that right results in denial of rights more fundamental to due process fairness?

II.

Was the denial of Petitioner's Motion for Severance error when Petitioner's conviction was based on evidence introduced against co-Defendants after Petitioner had rested, and should the doctrine of inherent prejudice apply to the severance issue in this instance?

III.

When prejudicial evidence was introduced against a co-Defendant after Petitioner had rested, should the Trial Court have given requested instructions that the jury could not consider such evidence against Petitioner?

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

RODNEY WAYNE ELLIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. _____
	)	
STATE OF GEORGIA,	)	
	)	
Respondent.	)	
	)	

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE UNITED STATES
FROM THE SUPREME COURT
OF THE STATE OF GEORGIA

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeals and the Supreme Court of the State of Georgia, which judgment was finally entered on January 25, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals for the State of Georgia, which has not yet been reported, is attached hereto as Appendix "A." Petitioner moved the Court of Appeals for the State of Georgia for a rehearing on that appeal. See, Appendix "A." Petitioner

then applied for Certiorari to the Supreme Court of the State of Georgia. The Supreme Court of the State of Georgia denied that Application for Certiorari on January 5, 1983. Said denial is attached hereto as Appendix "B." Petitioner finally moved the Supreme Court of the State of Georgia for a rehearing on the Application for Certiorari. On January 25, 1983, the Supreme Court of the State of Georgia denied the Motion for rehearing on the Application for Certiorari. See, Appendix "B," attached herewith.

STATEMENT OF JURISDICTION

The Supreme Court of the State of Georgia, the Court of last resort in said state, rendered a final decision in this matter on January 25, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), Petitioner having asserted below and now in this Court the deprivation of rights secured by the Constitutions of the United States and the State of Georgia.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides in pertinent part as follows:

"No person shall be. . .deprived of life, liberty, or property without due process of law;. . ."

The following portions of the Sixth Amendment to the Constitution of the United States are involved in this case:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution, in Section I, provides as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Additionally, this case involves the following Sections of the Georgia Constitution:

Article I, Section I, Paragraph I:

"No person shall be deprived of life, liberty, or property except by due process of law."

Article I, Section I, Paragraph XI:

"Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel; . . . shall be confronted with the witnesses testifying against him; . . ."

Finally, this case involves the following statutory provisions of the State of Georgia:

Ga. Code. Ann. § 26-801 (now O.C.G.A. § 16-2-20). Parties to crime; punishment

> "(a) Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime.
>
> (b) A person is concerned in the commission of a crime only if he: (1) directly commits the crime; or (2) intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity; or (3) intentionally advises, encourages, hires, counsels, or procures another to commit the crime."

Ga. Code Ann. § 27-2701 (now O.C.G.A. § 17-8-4) Separate trials. Competency as witnesses. Order of Trial. Operation of acquittal or conviction. Striking of jury.

> "When two or more defendants are jointly indicted . . . for a felony less than capital, or for a misdemeanor, defendants may be tried jointly or separately in the discretion of the trial court . . ."

STATEMENT OF THE CASE

On November 5, 1979, the Grand Jury for Cobb County, State of Georgia, presented Indictments against Petitioner, RODNEY WAYNE ELLIS, Robert Marion Hoskins, Samuel Thomas Rickman and Brenda Elaine Klutz, charging them with violations of the Georgia Controlled Substances Act (Ga. Code Ann. §§ 79A-8, et

seq.; now O.C.G. §§ 16-3-1, et seq.).

Numerous pre-trial Motions were timely filed in this case, including a Motion for Severance and Citation of Authorities. Hearings were held on those Motions on January 9, 10, 21 and 22, 1980, the Honorable Watson L. White, Judge, Cobb County Superior Court, presiding.

On February 9, 1981, Petitioner and his co-Defendants Hoskins and Rickman were brought to trial before a jury, the Honorable John W. Williford, Senior Judge, Georgia Superior Courts presiding. The other co-Defendant, Brenda Elaine Klutz, was not brought to trial and was not considered on the trial of this case.

At appropriate points during the trial, upon the conclusion of the State's case, and at the time Petitioner rested, Petitioner renewed his Motion for Severance. These motions were denied.

Additionally, Petitioner ELLIS requested certain instructions to be given to the jury concerning severance, the prejudicial effect on him for having been tried jointly with co-Defendants, and having evidence presented to the jury after he rested. All such motions, along with certain objections during the course of the trial, were denied by the Trial Judge.

On February 13, 1981, the State rested. Peti-

tioner ELLIS rested his case without presenting any evidence in his defense, and prior to the presentation of a defense by co-Defendants. At that point, Petitioner moved the Court to be excused from the Courtroom. This motion was denied.

On February 16, 1981, the jury brought back a verdict of guilty against Petitioner ELLIS and his two co-Defendants.

The Court sentenced each of the Defendants to seventeen years -- twelve years to serve and five years probation.

Thereafter, Petitioner timely filed his Motion for New Trial. Hearings were had on the Motion for New Trial as amended, and it was ultimately overruled on each and every ground on October 21, 1981. Following the denial of Petitioner's Motion for New Trial, he timely filed his Notice of Appeal and was therefore properly before the Court of Appeals of Georgia. That Appeal insofar as this Application for Writ of Certiorari is concerned resulted from the Trial Court's denial of Petitioner's Motion for Severance, Motion to be excused from the Courtroom, and certain requests to charge submitted by the Petitioner. All of these motions and requests were based upon the prejudice and harm to Petitioner by virtue of being tried jointly with his

co-Defendants. Further, as specifically regards his request to be excused from the courtroom, Petitioner was denied his right to waive a constitutional right and his right to effective assistance of counsel.

The Court of Appeals heard argument on this appeal and affirmed the decision and judgment of the Trial Court below.

Within the time provided by law, Petitioner moved for a rehearing of the Court of Appeals' decision, which was denied on November 12, 1982. In denying said motion, the Court of Appeals of Georgia made no changes in its opinion. Thereafter, Petitioner timely applied to the Supreme Court of Georgia for a Writ of Certiorari. Petitioner's Application was denied on January 5, 1983. Petitioner then timely filed a Motion for Reconsideration with the Supreme Court of the State of Georgia. That Motion for Rehearing was denied on January 25, 1983. Petitioner now timely brings this Petition from that final decision of the Supreme Court of the State of Georgia, the appellate court of last resort in said State.

The citations herein which refer to the trial transcript are designated as "T" with the page number following. Citations to the record other than transcripts of the trial are designated as "R" with the page number following.

REASONS FOR GRANTING THE WRIT

I.

THE CASE PRESENTS A UNIQUE AND IMPORTANT QUESTION OF LAW, AND THIS COURT SHOULD GRANT CERTIORARI TO PROVIDE A DEFINITIVE ANSWER AS TO WHETHER A CONSTITUTIONAL RIGHT IS PERSONAL TO AN ACCUSED, ANL MAY NOT BE FORCED UPON HIM AGAINST HIS WILL WHEN TO FORCE EXERCISE OF THAT RIGHT WILL RESULT IN DENIAL OF RIGHTS MORE FUNDAMENTAL TO DUE PROCESS FAIRNESS.

A. The forced invocation of Petitioner's right to be present at trial was error where his waiver was knowingly, intelligently and voluntarily made, and the decision below seriously confused the law on this issue in the State of Georgia.

Petitioner ELLIS asserted as error on appeal the Trial Court's denial of his motion to be excused from the Courtroom. The State of Georgia rested its case against all Defendants on February 13, 1981. T-761. After presentation, argument, and denial of Petitioner ELLIS' and co-Defendant Rickman's Motions for Directed Verdicts of Acquittal, and co-Defendant Hoskins' Motion to Sever, Petitioner immediately rested his case. T-777. At that point, Petitioner moved the Court to allow Petitioner and his counsel not to be present during any

of the proceedings which were to follow until the time that the case was to go before the jury, on the grounds that the case was concluded as to him and that any evidence which would be introduced by co-Defendants or the State in rebuttal would be prejudicial to this Petitioner. T-778. This Motion was denied by the Trial Court, and Petitioner was granted a continuing objection and motion for mistrial throughout the continuance of the co-Defendants' trials. T-780.

In addressing this issue, the Court of Appeals of Georgia concluded as follows:

> "In Georgia, a criminal defendant has a constitutional right to be present at all stages of his trial. Ga. Code Ann. § 2-111; Wilson v. State, 212 Ga. 73 (1) (90 S.E.2d 557); Durrett v. State, 135 Ga.App. 749 (2) (219 S.E.2d. 9). Such a right can be waived by the defendant. See, Wilson, supra. However, the exercise of a waiver of a constitutional right is not an absolute right, and the Trial Court must exercise its discretion when presented with a defendant's request to waive a constitutional right. It cannot be said that the Trial Court erred when it made a ruling which insured the enforcement of the defendant's constitutional right."

The first problem with the Court of Appeals' decision is that it entirely missed the point of Petitioner's argument. When the State and this Petitioner rested, and the State did not make any motion to reopen the evidence, Petitioner's trial, except for closing arguments and jury deliberations, had ended. When the

Trial Court denied Petitioner's motion to be excused from the courtroom, the Trial Court did not insure the enforcement of Petitioner's "constitutional right to be present at all stages of his trial." In this case, the Trial Court's decision insured that Petitioner would be present at all stages of someone else's trial, i.e., the other Defendants. His presence was not needed by the State -- it had rested and did not move to reopen its case. He was not needed by his co-Defendants -- they each had requested severance from Petitioner because his presence prejudiced them. No useful purpose was served by Petitioner remaining in the Courtroom. While holding that a defendant has the right to be present at all stages of his trial when his absence might thwart the fairness of the proceedings, this Court held in Snyder v. Massachusetts, 291 U.S. 96, 106-107 (1934), that due process does not assure "the privilege of presence when presence would be useless, or the benefit but a shadow." As a consequence, the law cited by the Court of Appeals is misapplied on its very face.

However, the case law is not only misapplied in this instance; that law is also misconstrued even if the Court were correct in its application. The holdings of the Courts below, without any supporting authority, that a defendant has no absolute right to waive a

constitutional right is an extremely dangerous stance. As numerous cases on search and seizure and the right to silence have pointed out, the exercise of a constitutional right is personal. Only an individual whose constitutional right is affected can assert that right. See, e.g., Wong Sun v. United States, 371 U.S. 471 (1963).

The right to be present at criminal trials falls within the confrontation clauses of the Sixth Amendment to the United States Constitution and Article I, Section I, Paragraph XI of the Constitution of the State of Georgia. People v. Parker, 32 Crim.L.Rep. 2072, 2073 (10-7-82); State v. Phillips, 247 Ga. 246, 275 S.E.2d 323 (1981). This fundamental right is extended to a Defendant in a State criminal prosecution by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1965). See also, Dutton v. Evans, 400 U.S. 74 (1970).

The highest Court of the State of Georgia has held that "confrontation rights are personal to the accused . . ." Byrd v. Ricketts, 233 Ga. 779, 213 S.E.2d 610, 611, cert. denied 422 U.S. 1011 (1975). Indeed, the very case cited by the Court of Appeals in its opinion, Wilson v. State, 212 Ga. 73, 90 S.E.2d 557 (1955), holds that the accused may voluntarily waive

his right to be present. The waiver must be knowingly, voluntarily, and intelligently made, and will be considered valid even when made through counsel, so long as the defendant was present at the time it was made or subsequently acquiesced thereto. State v. Phillips, supra; Wilson v. State, supra. Further, if the accused was present at the opening of the trial, but then voluntarily absented himself, where he was free on bond to come and go at will, he has waived his right to be present. Byrd v. Ricketts, 233 Ga. 779, 213 S.E.2d 610, cert. denied 422 U.S. 1011 (1975); Cawthon v. State, 119 Ga. 395, 46 S.E. 897 (1904); Miller v. State, 122 Ga. App. 869, 179 S.E.2d 265 (1970).

Petitioner's request to absent himself from the Courtroom was the product of a calculated tactical decision by counsel, to which Petitioner acquiesced. This automatically results in a knowing and voluntary waiver of Sixth Amendment rights. United States v. Dunlap, 577 F.2d 867 (4th Cir. 1978); Bailey v. State, ___ Ga. ____, 291 S.E.2d 704 (1982); State v. Phillips, 247 Ga. 246, 275 S.E.2d 323 (1981).

Here, the Petitioner had been admitted to bail; he was present when his case was called for trial; he pled not guilty; he was represented by counsel; he was present for jury selection; and his request to absent

himself - after he rested his case and only until closing argument - was a deliberate tactical decision. There can be no doubt that waiver of his appearance was knowing and voluntary. As noted from the above-cited case law, a Defendant will not be heard to complain of Sixth Amendment violations when these conditions exist. The decisions below have therefore seriously confused the law on this issue in the State of Georgia, and this Honorable Court should grant certiorari to provide a definitive answer and clarify the law on waiver of the constitutional right of confrontation. Otherwise, the Georgia Courts could arbitrarily insist on the exercise of a right even where defendant's best interest would be served by the waiver.

> ". . . What were contrived as protections for the accused should not be turned into fetters. . .
>
> . . . When the administration of criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safegaurds. . . is to imprison a man in his privileges and call it the Constitution." Adams v. United States Ex Rel. McCann, 317 U.S. 269, 279-280 (1942).

An analogous case to the one at bar is Faretta v. California, 422 U.S. 806 (1975), which cites Adams, supra, for the proposition that Constitutional rights are personal; and that a State cannot force a defendant to

exercise that right if he knowingly, voluntarily and intelligently chooses to waive it. In Faretta, this Court reversed the conviction where the defendant had been forced to accept an attorney to represent him against his will, and noted:

> "Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free to decide . . ." Id. at 834.

Therefore, the Court of Appeals of Georgia erred when it initially overlooked the material fact that Petitioner's trial had ended, and misapplied the law cited therein to the facts of this case. In addition the Court of Appeals of Georgia misconstrued the Trial Court's right to insist that a constitutional right be exercised by the Petitioner, against his will and when he knowingly, voluntarily and intelligently waived such right.

B. The forced invocation of Petitioner's confrontation right resulted in a denial of his right to effective assistance of counsel.

The decision to move the Trial Court to be excused from the courtroom after his case had ended was based upon a determination by Petitioner and his counsel that a waiver of his right to be present until such time as the case was to be presented to the jury was in

the best interest of Petitioner. The decision was one of strategy and tactics and was made after counsel evaluated the available defenses, discussed the case with Petitioner, and provided Petitioner the basis for an informed choice, as required of counsel. ABA Standards, Compilation, The Defense Function, § 5.2 (Control and direction of the case), pp. 127-28 (1974).

By not allowing Petitioner to be excused from the Courtroom, the Courts below have denied Petitioner the right to effective assistance of counsel as guaranteed to him by the Sixth Amendment to the Constitution of the United States, and Article I, Section I, Paragraph XI of the Constitution of the State of Georgia.

> "Effective assistance of counsel involves the right of counsel and his client to plan defense strategy and tactics, in private and independent of interference by the Court. Were this tenet not true, criminal convictions would always be subject to reversal on the alternative grounds -- first, of undue interference and restraint by the Court upon the conduct of the defense (United States v. Handy, 203 F.2d 407) [3rd Cir. 1952]. . ." Harrell v. State, 139 Ga. App. 556, 228 S.E.2d 723 (1976) (Emphasis added).

See also, Wilcoxon v. Aldredge, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626 (1942).

A long line of cases in Georgia dealing with a defendant's claim of ineffective assistance of counsel clearly shows that defense counsel has broad discretion

in formulating trial tactics and should be allowed to plan and execute defense strategies. See, Jones v. State, 243 Ga. 820, 256 S.E.2d 907 (1979), cert. denied, 444 U.S. 957 (1979); Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977); Spence v. State, ___ Ga.App. ___, 292 S.E.2d 908 (1982); Scott v. State, 157 Ga.App. 608, 278 S.E.2d 49 (1981); Harrell v. State, 139 Ga.App. 556, 228 S.E.2d 723 (1976). See also, Reid v. State, 235 Ga. 378, 219 S.E.2d 740, 742 (1975), a case of first impression in Georgia, which cites to the ABA Standards, the Defense Function, § 5.2 [". . .all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client."] Although these cases involve a claim that the errors were made by counsel's actions or omissions, and not by the Trial Court in restricting counsel's actions as here, the holdings apply to demonstrate that counsel should be free to use the tactics and strategies he deems best.

Further, as noted in Faretta v. California, 422 U.S. 806, 820 (1975), when a defendant consents to have an attorney represent him, "law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas."

The right to benefit of counsel is a valuable and

sacred one, and one that should never be denied or abridged. It is a "fundamental right, essential to a fair trial," and was therefore made obligatory on the States through the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). The mere presence of counsel at trial is insufficient to fulfill the guarantees of the Sixth Amendment; the right is to effective assistance of counsel. This concept has been interpreted to mean that there can be no restrictions upon the function of counsel in defending a criminally accused in accordance with the guarantees of the Sixth and Fourteenth Amendments. E.g., Brooks v. Tennessee, 406 U.S. 605 (1972) [restriction on counsel as to when and whether defendant should take the stand unconstitutional]; Ferguson v. Georgia, 365 U.S. 570 (1961) [prohibiting counsel from directly examining defendant after defendant was allowed to make unsworn statement unconstitutional]. Beyond that concept, Brooks held that where conflicts arise, they should be resolved in favor of right to assistance and guidance of counel.

In the instant case, Petitioner was denied his right to effective assistance of counsel. The refusal of the Trial Court to allow Petitioner and his lawyer to conduct the defense in the manner which they deemed best was tantamount to Petitioner's having no counsel at all.

This denial of Petitioner's Sixth Amendment right constitutes reversible error, and the conviction below should therefore be vacated.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE GEORGIA COURTS BELOW ERRED WHEN THEY DENIED PETITIONER'S MOTION FOR SEVERANCE WHERE PETITIONER'S CONVICTION WAS BASED ON EVIDENCE INTRODUCED AGAINST CO-DEFENDANTS AFTER PETITIONER HAD RESTED, AND TO CONSIDER WHETHER THE DOCTRINE OF INHERENT PREJUDICE APPLIES TO THE ISSUE OF SEVERANCE IN THIS INSTANCE.

A. The denial of the Motion for Severance was error.

Petitioner ELLIS, along with three, later reduced to two, co-Defendants, was indicted by the Grand Jury of Cobb County for violation of the Georgia Controlled Substances Act in 1979. On December 6, 1979, Petitioner ELLIS filed a Motion for Severance and Citation of Authorities. R-90-92. This Motion was denied by the Honorable Watson L. White, Judge, Cobb County Superior Court, on May 23, 1980. R-219.

On February 9, 1981, Petitioner ELLIS and his co-Defendants were tried on the charges against them before a jury, the Honorable John W. Williford, Senior Judge, Georgia Superior Courts, presiding. At appro-

priate points during the trial, upon the conclusion of the State's case, and at the time Petitioner rested, Petitioner ELLIS renewed his Motion for Severance. T-225-227, 335-337, 351, 772-773, 776-780, 826, 967-969; See also, in this regard, T-24-25 and R-93.

Additionally, Petitioner ELLIS requested certain instructions to be given to the jury concerning severance and the prejudicial effect on him of having been tried with co-Defendants and having evidence presented to and considered by the jury after he rested. T-782-783, 827, 858, 859, 909-910 and 1010. All such motions, along with certain objections during the course of the trial, were denied by the Trial Judge. The Trial Judge did instruct the jury that each co-Defendant was to be considered separately. T-1079-1080, 1094. Petitioner contended on appeal that these instructions were totally inadequate and did not cure the harm and prejudice which arose from this joint trial, particularly when the trial of the co-defendants continued after the State and this Petitioner rested, and no motion to reopen was made on the State's behalf.

In addressing the severance issue in reference to Petitioner, the Court of Appeals states as follows:

> "Insofar as. . .Ellis [is] concerned, the evidence, as previously summarized, was sufficient for a rational trier of fact to determine

> beyond a reasonable doubt that . . .Ellis [was a party] to the crime. See Code Ann § 26-801, 'while Code Ann. § 26-801 does not use the word "conspiracy" it is plain that it embodies the theory of conspiracy.' (Hamby v. State, 158 Ga.App. 265(2)) [279 S.E.2d 715] and, under such a theory, 'each of the acts and statements of each of these participants in the criminal enterprise is the same as if [Ellis] had done the act or made the statement himself. Thus, whether such evidence was admitted at a severed trial or a joint trial the effect and impact legally are the same.' "

The reliance on the above legal theories is misplaced in reference to this case, since the Court overlooked material facts which require a different holding.

In this matter Petitioner's co-Defendant, Bobby Hoskins, pled entrapment. See, T-784-802, 834-906. Co-Defendant Hoskins claimed that he was engaged in the illegal sale of a controlled substance to an undercover agent, but that he was entrapped into doing so. Neither Petitioner ELLIS nor his co-Defendant Rickman plead entrapment.

Petitioner ELLIS maintained his innocence throughout. He asserted that the State failed to show that he was in either actual or constructive possession of any controlled substance. See, T-762-767, 770-772. All witnesses to the event said that they neither heard of ELLIS before the arrest, nor did they see Petitioner at any time with any controlled substance. T-303, 327, 516, 611, 612, 677-678, 699, 701, 833, 933, 949. Fur-

ther, the State did not prove that Petitioner was a party to the crime either before or after Petitioner rested his case. For example, in responding to a series of questions, co-Defendant Hoskins stated as follows:

"Q. You said you had met Mr. Ellis somewhere down in Florida, I believe, at a fishing tournament or something like that, down in Florida?
A. Yes, sir.
Q. Did you ever see Mr. Rickman or meet Mr. Rickman back then?
A. No, sir.
Q. You mentioned something about prints that Mr. Ellis was handling at that time. Had you previously bought some prints or artwork or whatever from him?
A. Yes.
Q. And when you said you had some conversation with Mr. Ellis shortly prior to the 20th, about him coming over to Atlanta or to the Atlanta area --
A. Yes, sir.
Q. Do you know what that was about?
A. Well, he said he had to check out the flea market, I believe it was somewhere on Piedmont, over in the Atlanta area, to see about somebody selling some of his paintings cheaper than him, or something, and that he also wanted to talk to me again about you know, possibly me, you know, selling some of his work for him.
Q. Do you know some folks around here in Atlanta that had some shops that you might could have placed those prints in on consignment or whatever?
A. No, sir. I really --
Q. You were just sort of banking on getting some of his pictures and

doing what you could with them?
A. Yes, sir. That was one reason I was hesitant. Well, there were several reasons that I was hesitant.
Q. You said you got to the motel around the 4 o'clock time period, is that correct?
A. Yes, sir.
Q. And there was some activity in room 105, Rick Martin doing whatever he was doing with these white powders?
A. Yes, sir.
Q. Prior to seeing Mr. Ellis and Mr. Rickman at approximately, say 4:30 or a quarter to 5 or whatever that time was that you saw them, had you ever seen Tom Rickman prior to that time in your life?
A. No, sir, I have not.
Q. When you talked to Mr. Ellis on the days preceding the 20th, did he indicate that anybody else was going to be coming with him?
A. No, sir, he did not.
Q. When you saw Mr. Ellis outside of room 105, were you a little bit relieved?
A. Very.
Q. Why is that?
A. Well, he is a pretty healthy fellow and I knew then that Rick Martin had seen him and if there was any hanky panky going to be going on that he would, you know, relate to this guy next door.
Q. You think that he was going to help you out of that problem?
A. Yes, sir.
Q. Bobby, in your mind do you have any notion that Mr. Ellis and Mr. Rickman had any idea of what was going on in 105 before they got there?
A. No, sir, they did not.
Q. In your presence in that little brief encounter in the hallway outside of room 105, did you or Mr. Martin make any kind of comment that would give them any idea about

what in the heck was going on?

A. No, sir.

Q. And you are certain beyond any doubt that the sample you took over to 107, or that was taken over to 107, that was taken over before Mr. Ellis ever arrived?

A. Yes, sir."

T-903-905. See also, in this regard, T-988. In essence, ELLIS was there for some purpose other than co-Defendant and Decoy Martin, and ELLIS merely got caught up in an event about which he had no knowledge. The principal individual, Hoskins, testified that Petitioner was not involved. The conspiracy and parties to a crime theories therefore just do not apply under these facts.

Where evidence against Petitioner was thinly circumstantial at best, where one co-Defendant admitted the charges against him by pleading the defense of entrapment, where that same co-Defendant introduced evidence, or had evidence introduced against him about his prior drug addiction (T-861), possible other crimes (T-449, 838, 849-850, 860-862, 865; see also T-802-833, 986-987, 990-993) and other prejudicial evidence (T-913, 915, 920, 935 and 1112), and where Petitioner's defense of innocence was totally opposed and antagonistic to the co-Defendant's entrapment defense, the jurors inevitably linked co-Defendant Hoskins and the evidence

presented by and against him with this Petitioner. By not severing the parties, or at the least by not adequately instructing the jury, the Trial Court caused confusion of the law and evidence in regard to the two antagonistic cases that existed here. Indeed, the Trial Court itself recognized the possibility of confusion during the trial. T-219, 335-337, 351; see also, T-826 in this regard. As a result, Petitioner was prejudiced thereby.

While the evidence against Petitioner was "minimal," the evidence against co-Defendants, primarily co-Defendant Hoskins who admitted the offense, albeit by entrapment, was "substantial." Price v. State, 155 Ga.App. 844, 273 S.E.2d 225, 227 (1980). Indeed, the Trial Court recognized the minimal nature of the evidence against Petitioner at the time it denied Petitioner ELLIS' Motion for a Directed Verdict of Acquittal and concluded that there might be a very good chance that Petitioner ELLIS would not be convicted based on the evidence presented by the State to that point. T-768. See also, prosecutor's statement at T-769. Petitioner's conviction, then, more than likely resulted from the evidence against his co-Defendant rather than from the evidence against him. Hence, Petitioner was prejudiced thereby.

Further, the defenses as presented by Petitioner ELLIS and his co-Defendant Hoskins are in every respect "mutually exclusive and antagonistic." The defense of entrapment by which co-Defendant Hoskins admits the offense, cannot be reconciled with Petitioner's assertion that he is innocent of all charges against him, particularly where the only evidence against Petitioner ELLIS was circumstantial. Price v. State, 155 Ga.App. 206, 270 S.E.2d 203, 204-205 (1980), revised on other grounds, 247 Ga. 58, 273 S.E.2d 854 (1981). That rule applies where "[petitioner] was unable to cross-examine his co-defendant." Here, Petitioner ELLIS was not able to cross-examine his co-Defendants, including co-Defendant Hoskins who pled the defense of entrapment, because Petitioner had already exercised his right to rest his case at the conclusion of the State's case and before his co-Defendant presented evidence. Petitioner ELLIS' conviction then resulted from confusion and the "spill-over of the substantial evidence adduced" against his co-Defendants, particularly co-Defendant Hoskins. Crawford v. State, 148 Ga.App. 523, 251 S.E.2d 602, 605 (1978). However, even if there may have been some evidence supporting the verdict against Petitioner, the result in Crawford controls because, when balanced with the evidence

against the co-Defendant pleading entrapment, the evidence against Petitioner is scanty to the point of being non-existent. Id. at 603.

B. The doctrine of inherent prejudice applies to the issue of severance in this case.

Prior to 1963, in considering cases where there was pervasive pre-trial publicity, this Court made an examination of the facts to determine whether actual prejudice resulted to the Petitioner because the jury was probably unable to lay aside their opinions in view of that prejudicial publicity. See, e.g., Irvin v. Dowd, 366 U.S. 717 (1961); Marshall v. United States, 360 U.S. 310 (1959).

In four later cases, the Court broke away from the requirement that actual prejudice be shown and established the "doctrine of inherent prejudice." Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Turner v. Louisiana, 379 U.S. 466 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963). Three of these cases involved publicity by the news media; in Turner, the Court applied the doctrine where bailiffs who looked after the jury were also witnesses for the State.

The doctrine of inherent prejudice applies where jurors are exposed to extrinsic facts which did not come

as evidence developed against the Defendant from the stand, and which could conceivably have influenced the jury in rendering a verdict against the Defendant. A showing of actual prejudice is not required as a prerequisite to reversal. Instead, the doctrine comes into play when, based on the circumstances of the particular case, there is a high probability that prejudice will result and due process is therefore inherently lacking.

Although the doctrine of inherent prejudice is most frequently applied to cases involving pre-trial publicity, various Courts have applied the doctrine to different factual situations. See, e.g., Parker v. Gladden, 385 U.S. 363 (1966) [communication between bailiff and jury]; United States v. Howard, 506 F.2d 865 (5th Cir. 1975) [one juror told other jurors that defendant had been in trouble before]; Paz v. United States, 462 F.2d 740 (5th Cir. 1972), cert. denied, 414 U.S. 820 [book on drug problems and traffic in jury room during trial involving drugs]; United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972) [news article in jury room]; Downey v. Peyton, 451 F.2d 236 (4th Cir. 1971) [discussion among jurors of defendant's conduct and other affairs]; United States v. Pittman, 449 F.2d 1284 (9th Cir. 1971) [government witness operating tape recorder in jury room]; Farese v. United States, 428

F.2d 178 (5th Cir. 1970) [jury found money in exhibit where crime charged involved monetary gain]; and Richardson v. United States, 360 F.2d 366 (5th Cir. 1966) [juror/prosecution witness conversation].

In this case, after Petitioner had rested and the case was concluded as to him, evidence was introduced relating to his co-Defendants, especially Hoskins, which was inherently prejudicial to this Petitioner -- evidence which in all probability confused the jury and resulted in a conviction of Petitioner based on "guilt by association." This evidence included testimony as to Hoskins' being "ripped off" in a previous drug transaction; his former drug addiction and purchase of drugs on the street; his understanding because of his addiction of the dangers of drug abuse and yet apparent willingness to put it back on the streets; possible ownership of shrimp boats; the introduction of a tape recording of conversations of this particular transaction; and his admission of the crime charged through his entrapment defense. See, citations to transcript, supra.

All of this evidence introduced as to a co-Defendant violated Petitioner's right to have nothing reach the mind of the jury about his case except strictly legal evidence against the Petitioner admitted according to law. The "spill-over" effect of prejudicial evidence

against Hoskins invokes application of the doctrine of inherent prejudice as to Petitioner. Even the Trial Court's instructions to the jury, which Petitioner claims were insufficient (see, Argument III, infra) could not cure the prejudicial effect on Petitioner. As noted by Mr. Justice Jackson in Krulewitch v. United States, 336 U.S. 440, 453 (1949), "the naive assumption that prejudicial effects can be overcome by instructions to the jury. . .all practicing lawyers know to be unmitigated fiction."

Had Petitioner's trial been severed from his co-Defendants, the evidence which was introduced after he rested his case would never have been considered against him. There would not have been even a risk of prejudice, and Petitioner's rights to due process and an impartial trial would never have been jeopardized. The Courts of Georgia below have erred, and the violation of Petitioner's Fifth, Sixth, and Fourteenth Amendment rights mandates reversal of his conviction.

III.

THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE REFUSAL OF THE TRIAL COURT TO GIVE REQUESTED INSTRUCTIONS RELATING TO THE INTRODUCTION OF EVIDENCE AGAINST A CO-DEFENDANT AFTER PETITIONER HAD RESTED WAS ERROR.

As the Court of Appeals noted in its Opinion, Petitioner ELLIS complained that the Trial Court's refusal to give requested instructions after the denial of the renewed Motion to Sever was error. Petitioner sought to have the jury informed that they were not to consider against Petitioner any evidence introduced after he had rested.

In addressing this issue, the Court of Appeals states as follows:

> "Such a charge would have been inappropriate in light of the State's use of Code Ann. § 26-801 concerning parties to a crime. Furthermore, it was not error to refuse to give the requested instruction since the Trial Court could have exercised its discretion and allowed the State to reopen its case and present additional evidence. (Case citations omitted.)"

The Court of Appeals' determination is in error since the parties-to-a-crime and conspiracy theories fail under the actual facts of this case as set out heretofore in Section II of this Argument. Particularly is this so when both Petitioner and the State rested, and the alleged evidence in support of those theories came out after that point without a motion to reopen the evidence on the part of the State.

The Court of Appeals panel states further in its Opinion, however, that even under those facts:

". . .it was not error to refuse to give the requested instruction since the trial court could have exercised its discretion and allowed the State to reopen its case and present additional evidence."

The problem with that assertion is that the Trial Court could not have exercised that discretion here, since there was no motion to reopen the evidence brought by the State in this case. As a result, the case law cited here does not apply to the facts of this case, and the Court of Appeals erred in that regard.

CONCLUSION

For the foregoing reasons, the decision of the Georgia Courts below should be reversed, and the judgment of conviction against Petitioner should be vacated.

Respectfully submitted,

LAW OFFICES OF EDWIN MARGER

By: Edwin Marger by COD
EDWIN MARGER

By: Robert O. Davies
ROBERT O. DAVIES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a true and correct copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States from the Supreme Court of the State of Georgia upon James T. Martin, Esq., Assistant District Attorney, Cobb Judicial Circuit, P. O. Box 649, Marietta, Georgia 30061, by placing same in the United States Mail with adequate postage affixed thereon.

I HEREBY CERTIFY that I have this date served the requisite number of true and correct copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States from the Supreme Court of the State of Georgia upon Michael J. Bowers, Esq., Attorney General for the State of Georgia, 132 Judicial Building, Atlanta, Georgia 30334, by placing same in the United States Mail with adequate postage affixed thereon.

This 24th day of March, 1983.

ROBERT O. DAVIES

APPENDIX "A"

No. 63923
RODNEY WAYNE ELLIS, Appellant
v.
STATE OF GEORGIA, Appellee
Rehearing Denied November 12, 1982
Application for Certiorari Denied January 5, 1983
Application for Rehearing Denied January 25, 1983

SHULMAN, Presiding Judge

Appellants were tried together and convicted of possession of cocaine. Each now appeals from the judgment entered on the jury's verdict.

The following facts could be adduced from the evidence presented at trial. Using an informant as an intermediary, an undercover police officer made arrangements to purchase a kilogram (2.2 lb.) of cocaine from appellant Hoskens. After meeting Hoskens at a Delk Road motel, the undercover officer and Hoskens proceeded to the Best Western Motel on Interstate 20 to rendezvous with people arriving from Alabama for the deal. The officer and Hoskens' female companion rented adjoining rooms at the motel (Rooms 105 and 107). Surveillance teams stationed near the Best Western observed appellants Rickman and Ellis arrive in a car with Alabama tags and park next to Hoskens' automobile. The latest arriving appellants went into the motel, returned to the car, retrieved from it a brown briefcase, and reentered the motel.

Meanwhile, the undercover officer, having seen one pound of cocaine, having been told the remainder of the kilogram was "next door," and having been satisfied with the cocaine sample provided to him by Hoskens, left Room 107 of the motel and went to his parked automobile to obtain the money for the drug purchase. This conduct was the prearranged signal for the surveillance teams to assemble for the imminent arrests. The police officers gained access to Room 107 through the use of the undercover officer's room key, arrested Hoskens and confiscated a pound of cocaine. Upon knocking and announcing their identity as police officers at Room 105, they were met with the sounds of running water and a repeatedly flushed toilet. Using

the manager's pass key, the officers entered that room to find Ellis standing by the door and Rickman in the bathroom with an empty plastic bag. Scrapings from the toilet bowl and the residue from the plastic bag were identified as cocaine. A search of Room 105 uncovered a glass vial containing what was later identified as cocaine from between the bed's mattress and box springs, and a plastic bag containing a white powdery substance later identified as cocaine from a shaving bag.

1. Appellant Hoskens, who pled a defense of entrapment at trial, now asserts that the verdict is contrary to the law. "Entrapment exists where the idea and intention of the commission of the crime originated with a government officer or employee, or with an agent of either, and he, by undue persuasion, incitement, or deceitful means, induced the accused to commit the act which the accused would not have committed except for the conduct of such officer." Code Ann § 26-905. Hoskens maintains that the state failed to prove he was predisposed to commit the crime. However, Hoskens himself testified that a police informant's alleged offer of $1,500 caused him to become involved in the purported sale of cocaine. "[T]he mere fact that the defendant was persuaded (if he was) by a friend to engage in practices he knew to be criminal simply to 'make a lot of money' does not constitute entrapment; if it did, practically every offender could find and rely on such incidents in his own past." Leonardi v. State, 154 Ga. App. 402, 405 (268 SE2d 380). Hoskens' assertion of the general grounds is without merit.

2. Appellants Rickman and Ellis appeal from the denial of their motion to suppress evidence discovered pursuant to warrantless searches of Rooms 105 and 107 following their warrantless arrests.

An officer may make a warrantless arrest "if the offense is committed in his presence, or the offender is endeavoring to escape. . .or for other cause there is likely to be failure of justice for want of an officer to issue a warrant." Code Ann. § 27-207(a). A warrantless arrest is not violative of this statute if the officer had probable cause to make an arrest, i.e., if he knew facts and circumstances, based on reasonably trustworthy information, sufficient to warrant a prudent man to believe that the defendant had committed an offense.

Watson v. State, 153 Ga. App. 545 (1) (265 SE2d 871). The knowledge that a pound of cocaine was in the room "next door" to Room 107; the failure of anyone to respond to police requests to enter Room 105; the continuous sounds of running water and a flushing toilet; and Rickman's fully-clothed presence in a running bathtub with an empty plastic bag was ample cause to arrest appellants. It was not error to refuse to suppress the plastic bag and its residue (later identified as cocaine) found with Rickman or the samples of white powder an officer viewed on the rim of the toilet bowl. Both were dicovered in the plan view of officers who had a legal right to be where they were at the time they saw the evidence. Brewer v. State, 129 Ga. App. 118, 119 (199 SE2d 109).

3. Appellants Rickman and Ellis also protest the admission into evidence of a glass vial containing cocaine. The vial was discovered between the mattress and box springs of one of the beds in Room 105 by police officers conducting a search of the room subsequent to appellants' arrests. Whether or not this evidence was illegally seized is immaterial in light of the fact that the amount of legally seized contraband sufficiently supports the jury's verdict. See generally Lentile v. State, 136 Ga. App. 611 (1) (222 SE2d 86) where this court affirmed a conviction for possession of marijuana after suppressing some of the evidence pertaining to that charge.

4. The remaining contraband introduced at trial was discovered in Room 107 or in a blue shaving bag found in Room 105. At trial, Hoskens identified the bag as his. Since neither appellant Rickman nor appellant Ellis established that he had "a legitimate expectation of privacy" in Room 107 (rented by the undercover officer) or in Hoskens' blue shaving bag which he had left in Room 105, neither showed that his Fourth Amendment rights were violated with regard to the items seized from Room 107 and the shaving bag. Having failed to establish a violation of their Fourth Amendment rights, appellants do not have standing to challenge the constitutionality of these searches. United States v. Salvucci, 448 U.S. 83 (100 SC 2547, 65 LE2d 619).

5. Rickman and Ellis argue that warrants could have been procured by the police prior to the arrests

and search. This contention is without merit. In Lentile v. State, supra, p. 613, "the rendezvous point was not agreed upon until approximately an hour and a half beforehand, and it does not appear that the agents knew in advance that the defendant planned to proceed from the rendezvous point to his residence." That situation is analogous to the present one in that the police officers did not know beforehand that the deal would be moved to a different motel. It was not until Hoskens and the undercover officer met at the location originally agreed upon that it was decided that the sale would take place at another site. The drug purchase occurred approximately an hour and a half after the undercover officer's arrival at the second motel. As in Lentile, the time span was not so long as to require the procurement of a warrant.

6. Each appellant enumerates the denial of his motion for severance an error. Such a motion is committed to the sound discretion of the trial judge, whose ruling is subject to reversal only for an abuse of discretion. Montgomery v. State, 156 Ga. App. 448, 452 (274 SE2d 804). "Some of the considerations for the court in exercising its discretion have emerged from the cases considering motions to sever: 1. Will the number of defendants create confusion of the evidence and law applicable to each individual defendant? 2. Is there a danger that evidence admissible against one defendant will be considered against another despite the admonitory precaution of the court? 3. Are the defenses of the defendants antagonistic to each other or to each other's rights? [Cit.] If the defendant can show the court by some facts that failure to sever will prejudice him under one or more of these considerations, his motion should probably be granted." Cain v. State, 235 Ga. 128, 129 (218 SE2d 856). Furthermore, "the trial court's denial of the motion to sever will not be disturbed unless the defendant can make a clear showing of prejudice. [Cits.]" Depree v. State, 246 Ga. 240, 241 (217 SE2d 155).

Each appellant maintains that Hoskens' assertion of the defense of entrapment was antagonistic to the pleas of not guilty propounded by Ellis and Rickman. "The mere fact that co-defendants' defenses are antagonistic is not sufficient in itself to warrant separate trials. [Cit.] A showing of harm is necessary. [Cit.]" Cain v. State, supra, p. 129. Each appellant complains that

he was harmed by the evidence admitted against his co-defendants. We disagree.

Because Hoskens' entrapment defense required him to admit the commission of the offense with which he was charged, we are unable to find that Hoskens was prejudiced by the evidence adduced against his co-defendants. McDonald v. State, 156 Ga. App. 143 (5) (273 SE2d 881). Insofar as Rickman and Ellis are concerned, the evidence, as previously summarized, was sufficient for a rational trier of fact to determine beyond a reasonable doubt that Rickman and Ellis were parties to the crime. See Code Ann. § 26-801. "While Code Ann § 26-801 does not use the word 'conspiracy' it is plain that it embodies the theory of conspiracy" (Hamby v. State, 158 Ga. App. 265 (2) (279 SE2d 715)) and, under such a theory, "each of the acts and statements of each of the participants in the criminal enterprise was the same as if [Ellis and Rickman] had done the act or made the statement himself. Thu, whether such evidence was admitted at a severed trial or at a joint trial, the effect and impact legally is the same." Montgomery v. State, supra, p. 451. Consequently, none of the appellants has demonstrated harm or prejudice accruing from the denial of his motion to sever. Accordingly, the denial of the motions to sever was not error.

7. In a related enumeration, appellant Ellis asserts as error the trial court's denial of his motion to be excused from the courtroom. Ellis made the motion after he had rested his case without presenting any evidence in his defense and prior to the presentation of a defense by appellant Hoskens.

In Georgia, a criminal defendant has a constitutional right to be present at all stages of his trial. Code Ann. § 2-111; Wilson v. State, 212 Ga. 73 (1) (90 SE2d 557); Durrett v. State, 135 Ga. App. 749 (2) (219 SE2d 9). Such a right can be waived by the defendant. See Wilson, supra. However, the exercise of a waiver of a constitutional right is not an absolute right, and the trial court must exercise its discretion when presented with a defendant's request to waive a constitutional right. It cannot be said that the trial court erred when it made a ruling which ensured the enforcement of the defendant's constitutional right.

8. Both Rickman and Ellis complain that the trial court's refusal to give requested instructions after the denial of their renewed motions to sever was error. Appellants sought to have the jury informed that they were not to consider against Ellis and Rickman any evidence introduced after those defendants had rested. Such a charge would have been inappropraite in light of the state's use of Code Ann. § 26-801 concerning parties to a crime. Furthermore, it was not error to refuse to give the requested instruction since the trial court could have exercised its discretion and allowed the state to reopen its case and present additional evidence. See King v. State, 230 Ga. 581 (3) (198 SE2d 305); Burden v. State, 182 Ga. 533 (3) (186 SE 555).

9. Appellants Ellis and Rickman contend that error resulted from the trial court's refusal to grant their motions for a mistrial after the jury had allegedly discussed evidence before the case had been submitted to it. Appellants' enumeration is based upon a handwritten note submitted by a juror to the trial judge on the third day of the six-day trial. The note, written on a paper towel, read: "Please clarify: 1. What is an "agent?" 2. Are all agents police officers? The attorneys have been using the terms agent and officer interchangeably." Appellants maintain that this note is evidence that the jury improperly discussed the case prior to the close of the evidence. However, the contents of the note in no way indicate that an improper discussion had taken place, that any of the jurors had already formed an opinion on the case, or that a fair and impartial trial could not be had with this jury. "The question of whether or not to grant a mistrial lies within the sound discretion of the trial court. That decision will not be reversed on appeal absent an abuse of discretion." Roberts v. State, 242 Ga. 634, 636 (250 SE2d 482). No irregularity having been established and no harm having been sustained by appellants, the trial court did not abuse its broad discretion in deying the motions for mistrial. See Smith v. State, 218 Ga. 216 (2c3) (126 SE2d 789); Smith v. Blackshear, 127 Ga. App. 610 (194 SE2d 519).

10. Appellant Hoskens claims error in the trial court's refusal to poll the jury to determine whether its memebers had engaged in an improper discussion of the case. Inasmuch as no irregularity in the conduct of a

juror was shown to have occurred, it was not necessary to poll the jury. Since the actions of the trial court were not abusive of its authority, appellant's contention is meritless.

11. Appellants Rickman and Ellis also appeal the denial of their motions for directed verdicts of acquittal. Each appellant maintains that because the sole connection between him and the contraband was "spatial proximity," each appellant was entitled to a directed verdict of acquittal. See, e.g., McCann v. State, 137 Ga. App. 445 (224 SE2d 99).

"The trial court's refusal to direct a verdict of acquittal is error only where there is no conflict in the evidence and a verdict of acquittal is demanded as a matter of law. [Cits.] In reviewing the denial of a motion for directed verdict. . .the proper standard to be utilized by the appellate court is the 'any evidence' test. [Cits.] Sims v. State, 242 Ga. 256, 257 (248 SE2d 651).

Our review of the trial transcript leads us to conclude that there was evidence to support the trial court's denial of the motions for directed verdict. There was testimony that the undercover police officer had been informed by Hoskens that the cocaine would be brought to the Best Western by people from Alabama; Ellis and Rickman arrived in Ellis' car (which displayed an Alabama tag), parked next to Hoskens' station wagon and proceeded to the room which Hoskens' companion had rented. They returned to the car, retrieved from it a brown briefcase which was capable of containing a kilogram of cocaine, and reentered the motel. When the police announced their identify and requested admission into the Ellis/Rickman room, the officers were greeted with the sound of a toilet being flushed repeatedly. After gaining entry to the room and overcoming Ellis' resistance, the officers apprehended appellant Rickman in the bathroom where he was holding a plastic bag which contained cocained residue. A scraping from the commode also revealed the presence of cocaine. Inasmuch as there was testimony that appellants Rickman and Ellis were linked to the possession of the cocaine by more than "spital proximity," the trial court did not err when it denied the motions for directed verdicts of acquittal.

12. Citing Cunningham v. State, 248 Ga. 835 (4) (286 SE2d 427), Rickman contends that the admission into evidence of the brown briefcase constituted reversible error. In Cunningham, the Supreme Court reversed the appellant's murder conviction on the ground that the two pieces of physical evidence, unconnected to the crime, were admitted into evidence and considered by the trier of fact. That holding is not applicable to the case at bar since the briefcase here was connected to the appellants: it was found in their room, appellants had been observed carrying it from Ellis' car to the motel, and it was posited that the cocaine had been transported within it. It was not error to admit it into evidence.

13. Rickman next complains that the trial court erred in charging the jury on the concept of parties to a crime because the statute (Code Ann. § 26-801) upon which the instruction was based is allegedly unconstitutional. Because appellant made no constitutional objection to either the charge or the statute at trial, we will not address his enumeration other than to note that the Supreme Court held that Code Ann. §§ 26-801 and 802 were not unconstitutionally vague, indefinite and overbroad in Wanzer v. State, 232 Ga. 523 (6) (207 SE2d 466). Corley v. State, 154 Ga. App. 301 (2) (268 SE2d 508). Inasmuch as the evidence authorized a charge on parties to a crime, there was no error in so instructing the jury.

14. Appellants Hoskens and Rickman contend that a tape recording of conversations electronically transmitted by means of a "body bug" worn by the undercover officer was improperly admitted into evidence.

Rickman maintains that the trial court erred when it permitted the state to play portions of the tape recording to the jury after the court had denied appellant's motion to have the tape independently tested. Three conversations transmitted by the "body bug" were played for the jury by the state in rebuttal to appellant Hoskens' entrapment defense. In a pre-trial motion, appellant Rickman sought to have the tape independently examined to determine whether the tape had been altered and to see if inaudible portions could be made audible.

"A criminal defendant on trial for his liberty is

entitled on motion timely made to have an expert of his choosing, bound by appropriate safeguards imposed by the court, examine critical evidence whose nature is subject to varying expert opinion." Sabel v. State, 248 Ga. 10, 17 (282 SE2d 61). Because we have concluded that the tape recording was not "critical evidence," we do not reach the question of whether it is subject to varying expert opinion, and we affirm the trial court's decision to deny appellant's motion for an independent examination of the tape and to allow the jury to hear portions of the tape at trial.

"'Critical evidence,' for the purposes of the due process clause, is evidence, that, when developed by skilled counsel and experts, could induce a reasonable doubt in the minds of enough jurors to avoid a conviction." White v. Maggio, 556 F2d 1352, 1357 (5th Cir. 1977), cited with approval in Sable v. State, supra, p. 18. The tape recording, as used, did not constitute "critical evidence" as that term has been defined, and therefore the trial court did not err in refusing to allow an independent examination of the tape. It was not error to allow the jury to hear portions of the recording. See Tookes v. State, 159 Ga. App. 423 (3) (283 SE2d 642).

15. Hoskens' first argument against the admission of the tape is the alleged failure of the state to lay a proper foundation for the admission of a tape recording into evidence.

The basic steps for laying the proper foundation before a tape recording is admissible at trial are set forth in Steve M. Solomon, Jr., v. Edgar, 92 Ga. App. 207 (3) (88 SE2d 167), and its progeny. Since police officers testified "that the tape recorded was in condition to take testimony; that the operator of it was competent; that it was authentic and correct; that it had not been changed or altered; that it had been in their custody; and who the speakers were" (Estes v. State, 232 Ga. 703 (4b) (208 SE2d 806)), and "[t]here was absolutely nothing to indicate that [appellants'] statements were not voluntary and of [their] own choosing" (Brooks v. State, 141 Ga. App. 725, 735 (234 SE2d 541)), the proper foundation was laid and it was not error to admit the tape.

16. Lastly, appellant Hoskens argues that the

lack of a transcript of the portions of the tape played before the jury resulted in an incomplete record for this court to review.

The record and transcript of the case, which includes the reel of tape as an exhibit thereto, have been examined by this court. Appellant's claim of an incomplete record is without merit. See State v. Knowles, 247 Ga. 218 (274 SE2d 468).

17. Rickman and Ellis each enumerates as error the denial of his motion for new trial. Any ground for reversal presented in those motions not discussed above must be deemed abandoned as unsupported claims of error under Court of Appeals Rule 15 (c) (2). Code Ann. § 24-3615 (c)(2).

Judgment affirmed. Quillian, C.J., and Carley, J., concur.

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta,
November 12, 1982

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

63923. Rodney W. Ellis v. The State
63999. Samuel T. Rickman v. The State

Upon consideration of the motions for a rehearing filed in these cases, it is ordered that they be hereby denied.

COURT OF APPEALS
OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ ALTON HAWK, Clerk.

Court of Appeals
of the State of Georgia

ATLANTA, November 12, 1982

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

63923. Rodney W. Ellis v. The State

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Upon consideration of the motions for a rehearing filed in ~~this case~~ these cases, it is ordered that ~~it be~~ they be hereby denied.

Court of Appeals of the State of Georgia

CLERK'S OFFICE, ATLANTA NOV 12 1982

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

CLERK.

Alton Hawk

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 1/5/83

Case No. 39421, Ellis v. The State

The Supreme Court today denied the writ of certiorari in this case.

Very truly yours,
MRS. JOLINE B. WILLIAMS, Clerk

Clerk's Office, Supreme Court of Georgia

ATLANTA 1/25/83

The motion for a ~~rehearing~~ reconsideration was denied today:

Case No. 39421, Ellis v. The State

Yours very truly,
MRS. JOLINE B. WILLIAMS, Clerk